

Premi Alias Prem Das Vs. State

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Court : Delhi

Decided On : Oct-20-1968

Reported in : 5(1969)DLT385

Judge : Hardayal Hardy, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 233, 403 and 412;
[Indian Penal code, 1860](#) - Sections 380

Appeal No. : Criminal Revision Appeal No. 36 of 1968

Appellant : Premi Alias Prem Das

Respondent : State

Advocate for Pet/Ap. : K.C. Pandit, Adv

Judgement :

Hardayal Hardy, J.

(1) This criminal revision was received from jail and was admitted to regular hearing by my brother Tatachari J. on August 12, 1968. The grievance of the petitioner is that he had already been convicted for the same offence by the Chief Judicial Magistrate, Simla and should not have therefore, been convicted again for the same offence by the learned Magistrate, first class. Kasumpti. Although the petitioner's appeal had been dismissed by the learned Sessions Judge, Mahasu

on the ground that it was barred by time, my learned brother was of the view that the prohibition against conviction of the petitioner for a second time for the same offence being an absolute prohibition the contention should have been considered by the learned Sessions Judge regardless of the fact that the appeal filed by the petitioner was barred by limitation.

(2) In answer to the notice issued to the State Mr. K. C. Pandit has appeared on its behalf and has taken me through the files of the cases decided by the Chief Judicial Magistrate, Simla and the Magistrate, first class, Kasumpti. An examination of those files shows that the petitioner who is a habitual offender and has as many as 27 previous convictions, was arrested by the police in case No. 50 of 1964 under sections 380 and 457, Indian Penal Code. During the course of his interrogation in that case it was revealed that the petitioner was involved in theft of certain clothes from the Agricultural Rent House, Mashobra within the Jurisdiction of Police Station Dhalli, on the night between 11th March, 1967 and 12th March, 1967. Consequent upon the disclosure statement made by the petitioner recovery of certain articles was made and first information report No. 21 dated 12th March, 1967 was registered at the Police Station Sadar Simla for an offence under section 411, Indian Penal Code Further interrogation of the petitioner revealed that some of the articles recovered by the police were the result of a theft committed by the petitioner on 27th February, 1967 in the house of one Dina Nath in village Kiar Ktoi, also within the jurisdiction of Police Station Dhalli. This led to the registration of another first information report No. 22 at the Police Station Sadar Simla for an offence under section 411, Indian Penal Code, on 18th March, 1967

(3) Meanwhile since the main offence of burglary at the Agricultural Rest House at Mashobra had been committed within the jurisdiction of the Police Station Dhalli, another first information report No. 87 of 1967 was registered at that Police Station on 12th March, 1967 for offences under Sections 457 and 380, Indian Penal Code and the Superintendent of Police, Mahasu District sent a letter to the Superintendent of Police, Simla District stating that the proper course would be to charge-sheet the accused (petitioner herein) with the principal offence of house-breaking and theft and also under Section 411, Indian Penal Code for dishonesty, especially receiving or retaining stolen property especially when the punishment

provided for those offences was severer than that provided for on offence under Section 411, Indian Penal Code. A request was therefore made for cancellation of first information report No 21 at Simla.

(4) It however, appears that the police in Simla did not agree with the views of the Superintendent of Police, Mahasu District and parallel proceedings were allowed to be held in the two jurisdictions.

(5) Eventually the petitioner was put up for trial before the Chief Judicial Magistrate, Simla in two separate cases under Section 411 Indian Penal Code arising out of first information report Nos. 21 and 22 and was in due course also sent up for trial before the Magistrate first class, Mahasu District, Kasumpti for offences under Section 457 and 380, Indian Penal Code arising out of first information report No. 87.

(6) The record shows that the stolen property in respect of which the petitioner was sent up for trial before the Chief Judicial Magistrate, Simla and which had led to the registration of two separate first information reports 21 and 22 at the Police Station Sadar Simla, was recovered from the possession of the petitioner at one time and at one place. But since the interrogation of the petitioner revealed that part of the stolen property was the result of the theft at the Agricultural Rest House at Mashobra while the other part related to theft at village Kiar Ktoi, two separate first information reports were registered and two separate charge-sheets were submitted by the police at Simla in the Court of the Chief Judicial Magistrate.

(7) When the petitioner was produced before the learned Magistrate, he framed two separate charges against him for the offence of dishonestly retaining stolen property under Section 411, Indian Penal Code, dividing the property recovered from the petitioner into two parts viz. that relating to the theft at the Rest House and that relating to theft in village Kiar Ktoi and held a separate trial in each case. The petitioner who was not defended by a counsel pleaded guilty to the charge and was convicted and sentenced to rigorous imprisonment for one year in each case by a separate judgment delivered on 25th March, 1967. This sentence was awarded to the petitioner keeping in view the fact that he had several previous convictions for theft and cognate offences and consequently his liability to

enhanced punishment under Section 75, Indian Penal Code, of which due notice was given to him in the charge.

(8) The petitioner preferred appeals against his conviction and sentence before the Court of Session at Simla but the appeals were dismissed. After the police at Dhalli completed their investigation in the case arising out of first information report No. 87 the petitioner was placed on trial before the Magistrate first class, Mahasu District at Kasumpti. The learned Magistrate framed charge against him under Section 457/380. Indian Penal Code read with Section 75 1. P. C. The record shows that the charge related to 28 articles, such as Dunlop pillow. Pillow covers, curtains, bed sheets, a rug and a towel allegedly stolen by the petitioner from the Rest House at Mashobra. The judgment of the learned Magistrate shows that at that stage the petitioner brought it to the notice of the learned Magistrate that he had already been convicted for that very offence by the Chief Judicial Magistrate, Simla and that in the interest of justice the file of his previous conviction be called for from the Court of the Chief Judicial Magistrate. The petitioner also submitted that he could not be prosecuted twice for the same offence. The judgment further shows that since the petitioner had not pleaded guilty to the charge the Record Keeper, Simla District was summoned along with the file. Meanwhile the learned Magistrate proceeded with the trial. On 20th January, 1968 when the Record-Keeper appeared with the file, the petitioner pleaded guilty to the charge. Learned Magistrate observes in his judgment that after he had satisfied himself that the plea of guilty was not prompted by any duress or inducement he convicted the petitioner of the offences with which he had been charged and sentenced him to six months' rigorous imprisonment and a fine of Rs 50.00 on each count and in default of payment of fine to further imprisonment for 15 days. The sentences of imprisonment were ordered to run concurrently not only in that case but also with any other sentence which the petitioner was undergoing in Nahan Jail at that time. Learned counsel for the State submits that reference to the sentence in Nahan Jail was obviously to the sentence of imprisonment which the petitioner was serving out as a result of his conviction by the Chief Judicial Magistrate, Simla.

(9) The petitioner appealed against his conviction and sentence but as already stated, his appeal was dismissed by the learned Sessions Judge, Mahasu District

on the ground that it was barred by time. Hence, the present revision from Jail.

(10) The above narrative of events makes it plain that there was substance in the petitioner's grievance which went unheeded before the learned Magistrate at Kasumpti and also failed to receive consideration at the hands of the learned Sessions Judge, Mahasu District. Merely because the petitioner was a habitual offender and had a large number of previous convictions for theft and cognate offences did not justify the slipshod manner in which the police as well as the learned Magistrates at Simla and Kasumpti have dealt with his case.

(11) As soon as it was brought to the notice of the learned Magistrate at Kasumpti that the petitioner had been convicted and sentenced for the same offence by the Chief Judicial Magistrate, Simla and with the object of verifying that fact even the Record-Keeper of Simla District had been summoned by him with the fine, it became his duty to have examined the file for himself with a view to ascertain the correct position.

(12) Unfortunately for the petitioner, his appeal to the Court of Session was filed after the expiry of the period of limitation and as such there was no occasion for the learned Sessions Judge to apply his mind to the merits of the contention urged therein but now that the files of all three cases have been carefully scrutinised by me with the help of the learned counsel for the State, I have no doubt about the merits of the petitioner's contention,

(13) An examination of the reports submitted by the Sadar Police Simla under section 173, Criminal Procedure Code, and the documents and statements mentioned in sub-section (4) of that section in the two cases tried by the Chief Judicial Magistrate, Simla shows that the only evidence on which the prosecution case rested against the petitioner consisted of the alleged disclosure statement made by him and the discovery of the alleged stolen property from his possession. All the articles were recovered from the possession of the petitioner at one and the same time and a single recovery memorandum was prepared by the investigating Officer. 10 Articles out of those were identified by Deep Ram caretaker of the Agriculture Rest House. They were marked Exhibits P. 1 to P. 10 and a charge under section 411, I. P. C. read with section 75, I. P.C. was framed against the

petitioner for his having dishonestly retained the same. These articles were treated as case property in the trial resulting from first information report No. 21. Out of the remaining lot another set of 10 articles were separated and marked Exhibits P. 1 to P. 10 and a similar charge under section 411, I. P. C., read with section 75, 1. P. C., was framed against the petitioner. These articles were identified by Dina Nath of village Kiar Ktoi as belonging to him and were treated as case property in the trial resulting from first information report No. 22.

(14) To these charges the petitioner pleaded guilty and was convicted and sentenced as already stated above

(15) It is obvious that there was no prosecution evidence to prove that the articles forming the subject-matter of two charges were received by the petitioner at different times and the only evidence on the record was that the petitioner was found in possession of properties identified as belonging to two separate owners. In such circumstances, in my opinion the petitioner could not be convicted of two separate offences of receiving or retaining in respect of the property identified by each owner in two separate trials. It was not for the accused to prove that the act of receiving or retaining was only one. As a matter of fact in the present case the charge against the petitioner related to dishonest retention of the stolen property and not even to receipt by him. There was thus no doubt about the act of retention of the stolen property by the petitioner being one.

(16) The question as to whether a person who is found in possession of properties identified as belonging to different owners can be convicted of several offences of receiving or retaining in respect of the property identified by each owner came up for consideration before a Full Bench of the Punjab Chief Court in *Paras Ram v. Manja Khan*. The Court took the view that it was for the accused to establish that there was only one act of receiving when he was found with property forming the subject-matter of different thefts. This Full Bench decision dissented from a previous Division Bench decision of the same Court in *Kanhya v. Ganesh*. The High Courts of Calcutta and Allahabad, however, took a different view. The first of these cases is *Ishan Muchi v. Queen-Empress*, in that case certain persons were charged under section 411, I. P. C., and tried at two separate trials for dishonestly

receiving two lots of stolen property each of which had been stolen at different times from a different person. They were convicted in both cases and appealed in both. In each case the evidence showed that the particular lot of property which was the subject-matter of the trial had been in fact stolen from its respective owner. Both lots of property (or parts of both lots) were found at one search in the houses of the accused. They denied all knowledge of how the property had come there. There was no evidence as to who thieves were or as to how and when or from whom the accused had received any of the property. Learned Judges (Prinsep and Piggot JJ.) therefore held that there had been only one offence and set aside the second conviction on the ground that it was illegal in view of the provisions of section 403. Criminal Procedure Code.

(17) This case was followed by *Ganesh Sahu v. Emperor*. In that case several articles of stolen property were found in Ganesh Sahu's room. He was first charged under section 411, 1. P. C., in respect of the dishonest retention of some articles belonging to and stolen from a certain person. He was convicted but was acquitted on appeal.

(18) He was then charged again under section 411, 1. P. C., in respect of the dishonest retention of some articles belonging to B and was convicted. *Newbold and Suhrawardy JJ.* on appeal set aside the conviction by the following judgment :

'the petitioner in this case has been convicted under section 411, 1. P. C., on the charge of having been in the dishonest possession of stolen property on the 7th December, 1921. It appears that on that date several articles of property were found in the room occupied by the petitioner. In respect of some of them he was prosecuted and after being convicted under section 411, 1. P. C., by the trying Magistrate he was acquitted on appeal. He has now been tried and convicted in respect of other properties found in his possession on the same date. There was evidence that the different articles which were the subject of the charges in the two trials were stolen from different persons but there is no evidence that they were received at times. The facts of the case cannot be distinguished from those of *Queen Empress v. Makhan*, which follows the decision of a Divisional Bench of this Court in *Ishan Muchi v. Queen Empress*'. On this authority we hold that the

second trial was illegal under the provisions of section 403, Criminal Procedure Code.'

(19) Ishan Muchi's case decided by Calcutta High Court was followed by Aikman J. of Allahabad High Court in Queen Empress v. Makhan. Two parcels of stolen property belonging to and stolen from two different Parties at different dates were found at a search in Makhan's house. He was first charged with dishonest retention of a shawl belonging to and stolen from one person and was convicted. Whilst serving his sentence in respect of that conviction he was again charged with dishonest retention of other property belonging to and stolen from another person and was again convicted. Makhan appealed against his conviction on the ground that the property which was the subject-matter of the second trial was his own. Aikman J., however, set aside the second conviction thinking that the case was covered by the decision in Ishan Muchi's case.

(20) MAKHAN'S case was later approved by a Division Bench of that Court (Ryves and Daniels Jj) in Sheo Charan v. Emperor, where it was observed that the essence of an offence under section 411 or 412 is the act of receiving or retaining stolen property, if a thief hand over to the accused a bundle containing a number of articles, the offence committed by the accused in receiving those articles is a single offence and not a number of offences and it makes no difference whether the articles belonged to a single owner or to different owners.

(21) In King-Emperor v. Bishun Singh and another a Division Bench consisting of Adami and Bucknill JJ. examined at some length the two decisions of Calcutta and Allahabad High Courts in 15 Calcutta 511 and 15 Allahabad 37. The importance of that judgment, however, lies in the observations made by Bucknill, J who delivered the judgment of the Bench that where no evidence, one way or the other, exists as to whether receipt of various parcels of stolen property took place at the same or different dates no presumption can be drawn or assumption made as against the accused either that the offence of retention by the receiver constitutes one or more than one connected transaction. The prosecution cannot base its case or justify its procedure upon any presumption or assumption operating against an accused unless such presumption or assumption is grounded upon

evidence.

(22) The decisions of Calcutta and Allahabad High Courts were followed by Addison J. of Lahore High Court in Hayat v. Emperor where the learned Judge expressly dissented from the Full Bench decision of Punjab Chief Court in Paras Ram v. Manja Khan and a similar decision by the Court of Judicial Commissioner of Sind in Ghulamu v. Emperor. It was held :

'A person who is found in possession of properties identified as belonging to different owners should not be convicted of several offences of receiving in respect of the property identified by each owner unless the prosecution proves that they were received by him at different times. It is not for the accused to prove that the act of receiving was only one.'

(23) The view taken by Addison J. was followed by another single Judge of the same High Court (Agha Haidar J.) in Jalal v. Emperor, where it was held that :

'WHERE there is no proof whatsoever that the accused had received the proceeds of five different thefts on five different occasions and on the other hand it was more likely that the thief or thieves may have passed on the stolen property to the accused at one and the same time, the accused cannot be convicted under five separate challans for the offence of being in possession of stolen property under section 411.'

(24) Recently a learned single Judge of Andhra Pradesh High Court (Krishana Rao J.) has taken the same view in re Meenapati Daveed and another, Accused-appellants. Repelling the argument that where an accused is found in possession of stolen articles forming the subject matter of distinct thefts, he could be charged with and tried separately in respect of articles belonging to each owner the learned Judge observed that section 325, Criminal Procedure Code, cannot be availed of to adopt that course where there is nothing to show that the accused knew that the articles belonged to different owners.

(25) Applying the principle of law laid down in these cases to the facts of the present case, as already stated, the only prosecution evidence which formed the

basis of the charge against the petitioner in these two separate trials, was the recovery of the stolen property from the possession of the petitioner consequent upon the disclosure statement made by him and the identification of that property by its respective owners. The whole of the property was recovered in the course of one search at the same time and at the same place. While the statement of the petitioner which led to the discovery of the property was admissible under section 27 of the Evidence Act his further statement that he had stolen those articles from two different places on different dates could not be admitted in evidence. The police did not examine any other witness to establish that the petitioner was responsible for those thefts. They did not even examine any witness to establish the receipt of that property by the petitioner and rested their case merely on the retention of the property by him. For these reasons a charge under section 411, I. P. C., only for dishonestly retaining stolen property was framed against him. This charge was obviously based on the presumption arising under illustration (e) to section 114, Evidence Act. In this state of affairs, the petitioner could not have been sent up for trial nor could he be tried by the learned Chief Judicial Magistrate. Simla in two separate cases and convicted and sentenced separately in each case. The conviction of the petitioner in the case arising out of first information report No. 22 which followed the trial in the case arising out of first information report 'No. 21 was therefore wholly illegal and must be set aside.

(26) This brings me to the trial and conviction of the petitioner by the learned Magistrate at Kasumpti. An examination of the file in that case also shows that the prosecution did not attempt to establish the charge against the petitioner by any evidence other than the statement of Deep Ram caretaker of the Rest House about the complaint lodged by him with the police that the Rest House had been burgled between the night of 11th March, 1967 and 12th March, 1967 and the articles mentioned in his complaint had been stolen from there. The main plank of the prosecution in this case also was the recovery of the property from the possession of the petitioner, consequent upon the information given by him to the police at Police Station, Sadar Simla during the course of his interrogation. The question for consideration is whether in view of the fact that the petitioner had already been prosecuted and convicted for an offence under section 411, I. P. C., on 25th March, 1967 in the Court of the Chief Judicial Magistrate, Simla he could be

prosecuted and convicted once again for the offence of theft in respect of the same property including certain additional items of property which had not been recovered from his possession but with respect to which there was no other evidence that they had been stolen from the Rest House by the petitioner.

(27) In my opinion, to this question there can be only one answer and that is that the second trial of the accused (petitioner herein) for the offence of house breaking and theft under section 457 and 380, I. P. C.. could not be held in view of the earlier trial of the petitioner for the offence under section 411, I. P. C.. at which he had been convicted.

(28) Section -103, Criminal Procedure Code, in my opinion clearly bars such a trial. This section as is well-known embodies the ancient maxim *memoria debet his vexari pro eadem causa* (no person should be twice disturbed for the same cause) and provides that where a person has once been tried and convicted or acquitted of an offence he cannot again be tried for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237, Criminal Procedure Code. Section 236, Criminal Procedure Code, reads :-

'If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences'

Illustration (a) to the section shows that if A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating, he may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(29) In the present case it was open to the prosecution to have cancelled the case registered against the petitioner at the Police Station Sadar Simla as had been

suggested by the Superintendent of Police, Mahasu District and to have proceeded with the case registered at Police Station Dhalli for an offence under section 457 and 380, Indian Penal Code. The petitioner could then have been charged at the trial with house breaking, theft, receiving and retaining stolen property i.e. a charge under sections 457, 380 and 411, Indian Penal Code, or he could be charged with an offence under sections 457 and 380 or in the alternative for receiving and retaining stolen property under section 411. Since any of these alternatives was open to the prosecution under section 236, Criminal Procedure Code, having regard to the facts alleged against him once a choice was made and the petitioner was tried for an offence under section 411, I.P.O., only, his subsequent trial for an offence under section 457 and 380 was clearly hit by section 403, Criminal Procedure Code.

(30) Had the prosecution reported to that course of trying the petitioner only for an offence under sections 457 and 380, Indian Penal Code, but the evidence led by it made out a case for an offence under section 411, I.P.C., only the petitioner could still have been convicted of an offence under the latter section by reason of the provisions contained in section 237, Criminal Procedure Code. Illustration to that section makes the whole thing absolutely plain. It reads :--

'A is charged with theft. It appears that he committed the offence of Criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence'.

(31) The fact that the petitioner pleaded guilty to the charge makes no difference to the invalidity of the trial and conviction. The bar created by section 412, Criminal Procedure Code, to the right of an accused person to challenge his conviction by way of an appeal after he has pleaded guilty relates to a plea of guilty at a trial held according to law. If the trial itself is invalid and there is an absolute prohibition to the holding of the trial the plea of guilty by the accused cannot operate as a waiver of his right to question the legality of his conviction based on such a plea.

(32) It seems to me that the learned Magistrate, Kasumpti was himself in doubt about the correctness of the order of conviction recorded by him, toherwise

there is no reason why he should have awarded a sentence of six months rigorous imprisonment only for an offence under sections 457 and 380, I. P. C., when the petitioner was known to have had about 27 previous convictions and his last conviction for a comparatively minor offence under section 411, I. P. C., had been visited with a sentence of one year's rigorous imprisonment. The petitioner had been charged by the learned Magistrate under section 75, I. P. C. also. If the petitioner was rightly convicted a sentence of six months' rigorous imprisonment was clearly indefensible. It has to be for a longer term of imprisonment than the one awarded by the Chief Judicial Magistrate, Simla.

(33) The result of the foregoing discussion is that the conviction of the petitioner by the learned Magistrate first class, Kasumpti is declared illegal and is therefore set aside. The only conviction and sentence which is thus maintained is the one recorded by the Chief Judicial Magistrate, Simla in the case arising out of first information report No. 21 and if the petitioner has meanwhile served out the sentence awarded to him in that case he is ordered to be released forthwith unless he is being detained in connection with some other case against him.

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